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RSPA-00-7092-14

DEPT. OF TRANSPORTATION  
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**STUART M. BLUESTONE**  
Deputy Attorney General

October 10, 2002

Nancy E. Machado  
Office of the Chief Counsel  
Research and Special Programs Administration  
U.S. Department of Transportation  
Washington, D.C. 20590-0001

BY FACSIMILE TRANSMISSION  
AND REGULAR MAIL

RE: Petition for Reconsideration of preemption determination; your Docket No. RSPA-00-7092 [PDA-22(R)].

On Friday, September 20, 2002, the Research and Special Programs Administration, Transportation (RSPA), issued an administrative determination appearing at 67 FR 59396 (determination). The docket number is RSPA-00-7092 [PDA-22(R)] and the document is entitled Administrative Determination of Preemption by RSPA's Associate Administrator for Hazardous Materials Safety. On behalf of the New Mexico Regulation and Licensing Department, Construction Industries Division and the New Mexico Construction Industries Commission (State Regulators), please accept this letter as the first part of a petition for reconsideration of determination, as permitted according to the letter we received by fax yesterday from Edward Bonekemper, Assistant Chief Counsel for Hazardous Materials Safety and Research and Technology Law.

The State Regulators wish RSPA to reconsider its ruling on each of the New Mexico statutes and regulations found to be preempted in the determination. Specifically, the State Regulators request reconsideration of preemption of 19.15.4.10.1, NMAC; NMSA 1978, Section 70-5-7a; 19.15.4.9.1, NMAC; 19.15.4.9.2, NMAC; 19.15.4.9.3, NMAC; 19.15.4.9.4, NMAC; 19.15.4.9.5, NMAC; 19.15.4.15.1, NMAC; 19.15.4.13.3(C), NMAC; NMSA 1978, Section 70-5-7(C); 19.15.4.15.12, NMAC; 19.15.4.15.13, NMAC; 19.15.4.15.14, NMAC; 19.15.4.10.1, NMAC; NMSA 1978, Section 70-5-7(A); NMSA 1978, Section 70-5-9(A); NMSA 1978, Section 70-5-9(C); and NMSA 1978, Section 70-5-10. The State Regulators are submitting the comments below for the first time because, when this issue first arose, it was during a period of a few months when the agency had no legal counsel due to budgetary and other reasons. The bases for reconsideration can be summarized as follows:

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### 1. VEHICLE INSPECTIONS.

The determination states that New Mexico's requirement of inspecting out-of-state operators' vehicles creates an undue delay in the transportation and delivery of hazardous materials. 67 FR 59400. The State Regulators will provide evidence demonstrating that New Mexico's system of vehicle inspection does not apply to the vehicle itself (only to the safety devices associated with the transfer of LP gas), or to any part of a truck or its equipment that pass through New Mexico without transferring LP gas while in the State. Further, the system does not create undue delay because it functionally allows the operators to choose when and where their vehicles' safety devices will be inspected; there is no waiting period and a typical inspection takes only 45-60 minutes, which is well within the "presumptively valid" time frame referenced in the determination. 67 FR 59400. Also, this evidence will refute some of the allegations made by participants in the preemption determination process. While not an "on the spot" inspection system, *id.*, the New Mexico system is one better in that it creates less inconvenience in routing and scheduling.

### 2. EMPLOYEE EXAMINATION AND IDENTIFICATION CARDS.

The preemption determination states that the New Mexico examination and identification card requirements "are more stringent than the HMR training requirements." 67 FR 59401. The determination then states that while there is no indication that the New Mexico requirements conflict with federal requirements, the fact that the New Mexico requirements are more stringent is enough, alone, to compel preemption for drivers based outside the state. The State Regulators will provide evidence demonstrating that while the matters about which New Mexico tests, and the competencies for which New Mexico issues ID cards, are related to the federally required safety competencies, they are entirely distinct. This corroborates the preemption determination statement that "there is no evidence in the record that the substance of the New Mexico training requirements conflicts with the HMR training requirements." 67 FR 59402. The State Regulators will provide a legal analysis demonstrating that higher stringency alone is not enough for preemption.

### 3. LICENSING FEES.

The determination states the New Mexico license fees are unfair because they are a flat rate for domestic and out-of-state transporters regardless of the relative benefit the transporters receive from the program that the fees fund. 67 FR 59403. This fairness analysis is flawed because it is based on a cost/benefit approach that is inapplicable to New Mexico's regulatory scheme. New Mexico's fees are not related to the "movement" of LP gas in or through New Mexico. The only activity that is licensed is the in-state transfer of LP gas, prior to or after its transportation. Therefore, licensing fees are not related to the use of New Mexico's infrastructure, or the benefit derived from doing business in New Mexico. Furthermore, the fees are not a tax on business; they do not go into the State's general fund or otherwise become a part of the State's revenue stream. They are collected by licensing and exam services vendors as compensation for those

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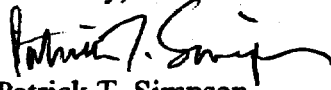
services and, therefore, directly support the regulation of safe transfer of LP gas in New Mexico. Through licensing, New Mexico applies a single standard for the safe transfer of LP gas to everyone, resident or not. The cost of achieving that standard of safety, therefore, is born equally by all who engage in the activity.

#### 4. CONCLUSION.

According to the directions in Mr. Bonekemper's letter, the second part of this petition for reconsideration, amplifying the bases for the reconsideration and providing additional information, will be submitted no later than October 30, 2002. I certify that I have complied with the provisions of 49 C.F.R. Section 107.211. If you need to contact us for any reason in the meantime, please contact the undersigned, Patrick T. Simpson at (505) 827-6070 (phone), (505) 827-6026 (fax), or [psimpson@ago.state.nm.us](mailto:psimpson@ago.state.nm.us) (email).

Thank you for your attention to and assistance in this matter.

Sincerely,



Patrick T. Simpson  
Assistant Attorney General

- c: Hugh W. Dangler, Deputy Superintending, RLD  
Robert M. Unthank, Director, CID  
American Trucking Associations, Inc. w/enclosure: Copy of 49 CFR § 107.211  
Basin Western, Inc. w/enclosure: Copy of 49 CFR § 107.211  
Dangerous Goods Advisory Council (fka HMAC) w/enclosure: Copy of 49 CFR § 107.211  
National Propane Gas Association w/enclosure: Copy of 49 CFR § 107.211  
National Tank Truck Carriers, Inc. w/enclosure: Copy of 49 CFR § 107.211  
The New Mexico Propane Gas Association w/enclosure: Copy of 49 CFR § 107.211

#### **NOTICE**

Pursuant to 49 CFR Section 107.211, each participant in the consideration of this matter before the RSPA may, within a time period and in a manner specified in the regulation, respond to this petition for consideration.